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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1941.

No. 1157

ROBERT A. HELTON, Administrator of the Estate of WALTER J. PROBERT, Deceased,

Petitioner,

vs.

CHARLES M. THOMSON, Trustee of Chicago & North Western Railway Company (Substituted for Charles P. Megan, Trustee, and Chicago & North Western Railway Company),

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT, AND SUPPORTING BRIEF.

CHARLES C. SPENCER,
HARRY A. BARNHARDT and
RICHARD M. SPENCER,
Counsel for Petitioner.

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May It Please the Court:

Robert A. Helton, administrator of the estate of Walter J. Probert, deceased, respectfully shows to this Honorable Court:

SUMMARY AND SHORT STATEMENT OF THE MATTER INVOLVED.

This is a suit based on the Federal Employers Liability Act, filed and tried in the Superior Court of Cook County, Illinois. Walter J. Probert (Petitioner's intestate) was employed in interstate transportation on the Chicago & North Western Railroad. In the night-time, on February 3, 1938, he was riding on top of a bad order box car, and was endeavoring, as his duty required him to do, to set out the bad order car on a short house track. He was giving signals, by a lighted fusee, to the fireman and engineer, whose respective duties were to relay and obey the signals. This they negligently failed to do, with the result that the car on which Probert was riding ran off the end of the house track, into and against a frozen embankment of earth, just beyond the end of the house track. The car was overturned and Probert was killed.

A verdict of a jury was rendered for petitioner for $13,500, on which judgment was entered by the trial court (Rec. 7). On appeal of respondent to the Appellate Court of Illinois, an intermediate court of review, that court reversed the judgment, without remanding the cause for a new trial (Rec. 167) on the ground that there was no evidence of negligence to submit to the jury (Rec. 182). Petitioner filed a petition for leave to appeal to the Supreme Court of Illinois, and that Court denied the petition on January 20, 1942 (Rec. 171). This petition for certiorari follows.

The record having been printed for the use of the courts below, we are filing with this petition for certiorari, a copy of the records of the trial court and the Appellate and Supreme Courts of Illinois, duly certified by the Clerk of the Supreme Court of Illinois (Rec. 171-2), and also

we furnish herewith 10 copies of the record as printed below, together with 10 printed additions showing the proceedings in the Supreme Court of Illinois and the opinion of the Appellate Court of Illinois (Rec. 169-185), in accordance with Rule 38, paragraph 7, of this Court. The proceedings in the Appellate Court, other than its opinion, are shown in the record printed for use in the court below (Rec. 167, 168).

In this petition we refer to the printed record filed below, and refiled here, and to the additions printed for this Court as (Rec. ....).

A BRIEF OUTLINE OF THE FACTS.

The freight train in question, consisted of 41 cars, and was going from Milwaukee, Wisconsin, to Chicago, Illinois, a distance of about 80 miles. Waukegan is a station about midway between Milwaukee and Chicago, and Lake Bluff, where Probert was killed, is a station about 5 miles south of Waukegan (Rec. 82). At the place in question the Chicago and North Western Railway runs north and south, and contrary to the general practice, runs its trains on the left-hand track, so that its northbound track is on the west and its southbound track is on the east.

This train was operated by a conductor, rear brakeman, engineer, fireman, and Probert, the head brakeman. The head brakeman, engineer and fireman were in the engine and the conductor and rear brakeman were at the rear of the train.

On the southerly trip from Milwaukee to Chicago, at Waukegan, Grogan, the conductor, and the rear brakeman, Foley, discovered a bad order car and, without any consultation with a train dispatcher, or with other members

of the crew of the train involved, the conductor, as was his duty, and would have been the duty of any other man in charge of the movements of the train, immediately took steps to set out the bad order car on one of the tracks at Waukegan (Rec. 126).

This bad order car was the 8th from the rear of the train and the 34th from the front. It had an air leak underneath the car, and as Grogan testified, was of "sufficient character, to justify me, as I thought, in setting it out at Waukegan." The angle cocks on the car were closed and the air was "bled", which made "the brakes useless on the car; would deprive that car of the air braking power." (Rec. 126)

After the train had been cut immediately behind the bad order car, through a misunderstanding of signals, the engine with the 34 cars attached thereto proceeded on south leaving the balance of the train at Waukegan (Rec. 127). The conductor telephoned the dispatcher at Chicago from Waukegan and told him that part of his train had been left there (Rec. 128). At Lake Bluff, where there was an interlocking plant, the forward end of the train was stopped by the towerman, and he gave to Probert the following message: "Chicago, Illinois, February 3, 1938: to engineer: You left your rear part of train at Waukegan. Set out part of train you now have on east passing track at Lake Bluff and return at Waukegan on westward track for balance of your train. O.A.G." (Rec. 66).

At Lake Bluff running off of the east main track were two switch tracks running north, one known as the passing track, capable of holding approximately 60 freight cars, and the other known as the house track, holding only about 13 cars.

The passing track was used sometimes for the purpose of holding a train while another train on the main line passed it, but not always used for that purpose. The house track was used for setting out cars which were designed to be left for a time at the Lake Bluff station either for loading, unloading or other purposes (Rec. 87).

Two ordinary railroad ties were laid across the rails of this track at its north end and immediately north of that end was a dirt embankment which at the time of this accident was frozen solid (Rec. 18).

After receiving the message from the dispatcher, Probert, the engineer and the fireman read it and Probert then left the engine for the purpose of putting the train on the passing track. Probert waited on the ground while the train proceeded southward a sufficient distance to back into the passing track. While in this position and when the last car on the train was south of the points of the house track switch, Probert stopped the train by signalling the engineer (Rec. 147).

At this point in the movement the evidence shows that Probert discovered, or for the first time learned that the bad order car was in the train, being the last or northern most car of the 34. Probert then having learned of the presence of the bad order car without brakes, which made it a hazard, or danger, to the whole train, proceeded, as it was his duty to do, to set out the bad order car, without brakes working on it, on to the house track. And it was while Probert was engaged in this act, that because of the failure of the fireman to relay, and the engineer to obey, the signals which were given by Probert to the engineer through the fireman, and because of this negligence of the engineer and fireman, the bad order car, upon which Probert was then riding, ran off of the north end of the house track and turned over and Probert was killed (Rec. 148, 143).

JURISDICTIONAL STATEMENT.

Jurisdiction is based upon Section 344 (b), Title 28 U. S. C., which is in part as follows: "Where any title, right, privilege, or immunity is specially set up or claimed by either party under the Constitution, • • • or statute of • • • the United States". (U. S. C., Title 28, Sec. 344 (b)).

The date of the original decision of the Appellate Court of Illinois sought to be reviewed is July 1, 1941 (Rec. 167); the petition of petitioner for leave to appeal from the judgment of the Appellate Court to the Supreme Court of Illinois was denied January 20, 1942, making final the judgment of the highest court of the State of Illinois, in which a decision could be had (Rec. 171).

The opinion of the Appellate Court of Illinois appears at page 173 of the record. It is also reported in 311 Ill. App. 354 and in 36 N. E. (2d) 267. No opinion was filed in the Supreme Court of Illinois.

The federal question presented is the denial by the highest court of the State of Illinois, in which a decision could be had, of the right claimed by petitioner to recover damages for the death of the deceased, under a statute of the United States, namely, the Federal Employers Liability Act (U. S. Code, Title 45, Sections 51 *et seq.*).

THE QUESTIONS PRESENTED.

1. Does the record contain evidence sufficient to sustain the verdict of the jury, finding that the death of Probert was caused in whole or in part by the negligence of respondent?

2. Does the record, by all the evidence, show that the death of Probert was caused solely by his own negligence,

the burden of proof concerning contributory negligence being upon respondent? (*Central Vermont Ry.* v. *White*, 238 U. S. 507.)

3. Probert was not guilty of negligence in attempting to set out the bad order car on the house track.

4. Probert did not disobey the order of the train dispatcher to put the train on the passing track, by attempting to set out the bad order car on the house track. The order as given had no reference to, and did not take into consideration the presence of a bad order car in the train.

5. When Probert discovered the bad order car, it created an emergency, upon which he had to act on his own judgment. In the absence of the conductor and the rear brakeman he was in charge of the train.

6. In the circumstances the proper thing for Probert to do was to set out the bad order car on the house track.

7. It is our contention that the Appellate Court of Illinois, by its opinion and judgment, erroneously found that the death of Probert did not result in whole or in part from the negligence of respondent, and also in finding that the death of Probert was caused solely by his own negligence. In making these findings the Appellate Court ignored and disregarded the evidence in the case, upon which evidence the jury and trial court properly found that respondent was guilty of negligence in whole or in part resulting in the death of Probert, and that the death of Probert was not caused solely by his own negligence.

8. By these findings and the judgment of the Appellate Court based upon said findings, and the judgment of the Supreme Court of Illinois denying petitioner's petition for leave to appeal to the Supreme Court of Illinois, the petitioner and the widow and minor son of Probert were deprived of their right to trial by jury.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

1. The Appellate Court of Illinois has decided a federal question of substance in a way clearly not in accord with applicable decisions of this Court. (Rule 38, 5 (a) of U. S. Sup. Ct.)

2. The Appellate Court of Illinois by its decision has deprived petitioner, and the deceased's beneficiaries, of their right to trial by jury in a claim based upon the Federal Employers Liability Act.

3. The instant case comes plainly within the purview of the following rule of this Court, as to what reasons will be considered for granting a writ of certiorari: Rule 38, 5 (a), "Where a state court has decided a federal question * * * in a way probably not in accord with applicable decisions of this court."

WHEREFORE, Petitioner prays that a writ of certiorari be issued, by this Court, directed to the Appellate Court of Illinois, in and for the First District, commanding that Court to certify and send to this Court a transcript of its record and proceedings, and that the judgment of the said Appellate Court of Illinois, in and for the First District, may be reviewed and reversed by this Honorable Court, and that the judgment of the Superior Court of Cook County, Illinois, be affirmed, and that petitioner may have such other and further relief as is proper.

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Counsel for Petitioner.

BRIEF IN SUPPORT OF PETITION.

ASSIGNMENT OF ERRORS.

The Appellate Court of Illinois, First District, erred:

In reversing the judgment of the Superior Court of Cook County;

In holding that there was no substantial evidence in the record supporting the verdict of the jury and the judgment of the trial court;

In holding that the evidence did not show that the death of Probert was caused, in whole or in part, by the negligence of respondent;

In holding that the evidence in the cause showed that the death of deceased was caused solely by his own negligence.

PROPOSITIONS OF LAW AND FACT RELIED ON.

In accordance with the decisions of this Court, petitioner was entitled to recover under the evidence in the cause.

Jenkins v. *Kurn*, 313 U. S. 256.
Seago v. *N. Y. C. RR. Co.*, 62 S. Ct. 806.
Southern Ry. Co. v. *Stewart*, 62 S. Ct. 617.
B. & O. Ry. Co. v. *Wilson*, 242 U. S. 295.

The burden of proof concerning contributory negligence of the deceased was on respondent.

Central Vermont R. Co. v. *White*, 238 U. S. 507, 512.

"Where uncertainty as to the existence of negligence arises from a conflict in the testimony or because, the facts being undisputed, fair-minded men will honestly draw different conclusions from them, the question is not one of law but of fact to be settled by the jury."

Gunning v. *Cooley*, 281 U. S. 90, 94.

The decision of the question whether or not a verdict should have been directed in favor of the defendant, in a case based on the Federal Employers Liability Act, is a federal question for the decision of this Court.

Central Vermont Ry. v. *White*, 238 U. S. 507, 509.

If there is any substantial evidence in the record tending to prove that the death of Probert resulted, in whole or in part, from the negligence of respondent or his employees, or by reason of defects or insufficiency in the equipment or the track of the railroad, due to respondent's negligence, then the judgment of the Appellate Court reversing the judgment of the trial court, based on the verdict of a jury, without even giving petitioner an opportunity to try his case before another jury, is wrong.

U. S. Code, Title 45, Sec. 51.

In the circumstances of the instant case it was the proper and logical thing for Probert to do, to put the bad order car on the house track, and he was guilty of no negligence in so doing.

It would have taken much more work, time and trouble to have put the bad order car at the extreme north end of the passing track, than at the north end of the house track, which was only about one-fifth as long as the passing track, and it would have required much more labor, expense and trouble to have got the bad order car out of the passing track, than it would out of the short house

track, when the respondent came to take it to the shop or to a repair track to repair it.

Helton, the petitioner, who is a train dispatcher for the Milwaukee railroad, testified that where a bad order car was set out from a train at a place where there was a passing track holding 50 or 60 cars, and a house track that would hold approximately a dozen cars, the proper and practical place for "the bad order car would be on the house track. * * * Because it would not interfere with other trains using the passing track for passing trains" (Rec. 14-15).

If the bad order car had been put on the house track that would have disposed of the whole matter as far as this train was concerned, but with the car left on the passing track, at the end of a train of 34 cars, it would have produced confusion.

To have shoved the 34 cars in on the passing track with the bad order car on the end, and left it there, "It would create a hazard. It would leave the car practically in the center of the track and another train would have to have information with regard to that car; otherwise it would be a hazard" (Rec. 35-36, Helton's testimony).

Bad order cars are set out "wherever it is convenient for us" (Rec. 46). Evidence of Grogan, the conductor.

When a bad-order car is discovered in the train it is the duty of the crew to set that car out of the train (Rec. 28). And where the conductor and rear brakeman were left behind it would be the duty of the head brakeman (Probert) to take charge and give signals in the operation of the train (Rec. 33) and it would be good railroading to set the bad order car on the house track (Rec. 29, Evidence of Helton).

Olsen, the engineer of the train in question, a witness for his employer, testified: "This house track was just for spotting merchandise cars; setting out cars that were t.o be unloaded, or probably *they might put one or two cars in there like a bunk car or supply car or something like that.* The passing tracks east and west, *were used for trains to get in to let other trains pass*" (Rec. 53).

Grogan, the conductor of the train, testified in regard to "bad order cars not fit to be run on the road * * * we usually set them out wherever it is convenient for us * * * we put them any place wherever there is room for them" (Rec. 46).

Railroad companies recognize the fact that they cannot make rules that will cover all situations, and it becomes the duty of the man in charge of the train to use his or their own best judgment in those cases, each of them separately (Rec. 42). The man running a train, the head brakeman who has been made a conductor, all of those men running a train are supposed to be experienced, and to use their head in operating their train (Rec. 95). This last was testified to by Glasscock, the chief dispatcher of respondent. It is proper to set a bad order car out on some track where it would not interfere with main line operation until it can be taken to a repair point and this may be done without asking authority from the dispatcher (Rec. 113). The above is evidence given by Mr. Shavel, the dispatcher of respondent in charge at the time of this occurrence. Grogan, the conductor of the train in question, testified (Rec. 129). To set out this bad order car on the house track it would be necessary for them to back it in on the house track and cut it off, then pull from that track on to the main line. Then they would have to carry out the orders of the dispatcher with reference to the 33 cars they still had, by backing in on the passing track.

Clarence E. Larson, the chief train dispatcher of the Chicago, Milwaukee, St. P. & P. R. R., was called as an expert witness by respondent in the instant case. He was the first witness for respondent and apparently the one most relied upon by him as an expert.

Mr. Larson testified that if the conductor of a freight train should find a bad-order car, "supposing it is the 8th car from the rear," it would be the duty of the conductor to set it out. And in order to do that it would not be necessary for him to get in touch with any dispatcher.

He further testified: "Where a head brakeman being the only one of a crew besides the engineer and fireman, is attempting to put a string of thirty-four cars attached to the engine, backing in on a siding and on a passing siding, if he discovered a car at the rear of those cars that had no brakes, or the brakes were not working, it would be his duty to set that car out, and *it would not be improper, if there was a house track or storage track that was used for the purpose of setting cars that were to be left for some time, close by, to set the bad order car on that track*" (Rec. 73-74).

Not one of the many experts put on by respondent denied that this bad order car should have been set out, or denied that it was proper to set it out on the house track. All those witnesses were asked if it would be in accordance with proper railroading to put the *train* of 34 cars on the passing track instead of on the house track, but none testified that it would be improper to set out the *bad order car* on the house track.

The Appellate Court says (Rec. 180), "since this house track accommodated only 10 or 12 cars, Probert, who had been engaged as a brakeman on the road for some 16 years and was familiar with the track layout, must have known that it was dangerous to back a 34-car freight train

thereon." There is no evidence whatever in the record that justifies the assertion that Probert was attempting to put 34 cars on a track that would only hold 10 or 12. Such a suggestion is ridiculous. The Appellate Court in its whole opinion has proceeded on the erroneous inference that Probert was attempting to set this train of 34 cars on the house track which would only hold 10 or 12 cars. Then in applying the law to the facts as erroneously found that court has confused this case with a line of cases holding that a violation of some positive duty or rule by an employee was the *sole* cause of the injury there can be no recovry. As we shall show, this case is entirely different from any of those cases.

The error into which the Appellate Court has fallen in regard to the use of the house track is well illustrated by this excerpt from its opinion: "The evidence discloses that at least for ten years before this accident no cars on this track had rolled much beyond the freight house, and none as far as the improvised bumper at the dead end of this track" (Rec. 180).

The sole basis in the record for this statement, that we can find, is the evidence of Bubb, the station agent at Lake Bluff: "From my observation, only about one merchandise car at a time is set out there; that is what we call spotted at the freight house platform. Prior to this accident the end of the house track was about 150 feet north of the freight house platform. During that ten years I have had no experience with those merchandise cars, that were put in there to be spotted at the freight house, going beyond the freight house, rolling as they call it" (Rec. 123).

Of course, the merchandise cars *spotted for unloading* at the freight house would not go *beyond the freight*

house. But this evidence has no application to cars such as "a bunk car or supply car or something like that" (Rec. 53) when they were put on the house track, nor does it apply to any other car such as a bad order car, which was put on the track to be left for an indefinite time. The natural place for a bad order car would be at or near the north end of the track, where it would be out of the way.

As a matter of fact the house track extended 262 feet north of the freight house, instead of 150 feet as Bubb says, as is shown by the blueprint mentioned by the Appellate Court in its opinion (Rec. 175). It would be passing strange, if this great railroad system should maintain 262 feet of track for ten years in this busy commercial and industrial center, and never use it.

Probert did not violate the order of the train dispatcher, as the order did not include the disposition of a bad order car, and was not made with reference to, or in contemplation of, a bad order car.

The order reads: "To Engineer: You left your rear part of train at Waukegan. Set out part of train you now have on east passing track at Lake Bluff and return at Waukegan on westward track for balance of your train" (Rec. 66).

The whole case revolves around this written order. The Appellate Court of Illinois, in its opinion, several times says Probert disobeyed this order, and in doing so he was negligent and this negligence was the sole cause of his death (Rec. 182, 193). In making these statements the Appellate Court exhibits a grave misapprehension of the record.

The bad order condition of this car was entirely unknown to any member of the crew of the train excepting Grogan and Foley, who were at the rear of the train and remained in Waukegan until after Probert left the engine

with the intention of guiding the train into the passing track, in accordance with the message from the train dispatcher in Chicago, and Probert then discovered the serious, bad condition of this car.

Judge Nelson, the trial judge, seems to have been of the opinion that if the deceased discovered the car without brakes after he received the written message, that he would be justified in setting out the bad order car on the house track (Rec. 94). Evidence of Glasscock, chief train dispatcher of C. & N. W. Ry.

"The bad order car was not included in the message" (Rec. 105). Evidence of Dugan, chief train dispatcher of Wis. Div. C. & N. W.

Nobody knew about the bad order car except the train dispatcher and Arquilla, the leverman (Rec. 49-52). The message Arquilla got was for the head brakeman (Rec. 52).

It was *after* the train dispatcher at Chicago had dictated to the towerman the order, that the train dispatcher learned from a telephone call from Grogan, the conductor, that there was a bad order car in the train (Rec. 109).

Glasscock, chief train dispatcher for the Chicago and North Western Road, gave testimony on cross-examination very favorable to petitioner. Applying his testimony to the facts of the instant case he in effect admitted that if Probert did not know of the bad order car when he left the engine after reading the note from the train dispatcher, and that when he was at the back of the 34 cars, he discovered the bad order car, that he would be justified in using his own judgment as to what was to be done with the bad order car (Rec. 93-95).

The trial judge, who in the instant case, as was said by this Court in *So. Ry. Co.* v. *Stewart*, 62 S. Ct. 616, 618: "Alone of the judges in the several proceedings below had the opportunity to see and hear the witnesses," in commenting on the evidence, said: "Now his answer was that this order of the towerman, or the dispatcher by the towerman, affected only the entire thirty-four cars; nothing in the order about setting out any kind of a bad order car and he [the witness] said the proper track was to set it on the house track" (Rec. 30).

Rule 964 provides: "Cars must not be left on passing tracks without authority of chief train dispatcher" (Rec. 153). It would appear from this that Probert would not have any right to put the bad order car on the passing track and *leave it there*, where it might have remained for days, but he did have the right and discretion to put it in on the house track and leave it there until it was taken away to a shop or to a repair track for repairs.

Probert was directed to set out the train of 34 cars on the passing track during the few minutes it would take to go the 5 or 6 miles to Waukegan with the light engine, and come back and hook onto the 34 cars and proceed to Chicago. When he discovered the bad order car without working brakes, he was prohibited by rule 964 from putting the car on the passing track and *leaving it there*.

The conductor and rear brakeman were in Waukegan; Probert was on the ground 1300 feet or more from the engineer, and could communicate with him only by signals given by means of the fusee. He had no means of communicating with any train dispatcher. The responsibility of directing the movements of the train was his; it was the duty of the fireman to relay Probert's signals to the engineer and of the engineer to obey the signals; the dangerous car was there; Probert had to act on his own initia-

tive and act promptly; the means and the method were at hand, namely, to put the bad order car on the short house track, and leave it there. This he proceeded to do, and it would have been done with safety to all concerned, had the fireman and engineer cooperated with him and obeyed his signals.

The engineer and fireman were guilty of negligence in not obeying and carrying into effect, the signals of Probert, and this resulted in the car's running off the improperly protected end of the track, and overturning, and killing Probert.

The Appellate Court in its opinion (Rec. 180) admits that there is a dispute in the facts as to whether or not the engineer and fireman were negligent in not slowing down the train more "when Probert gave the slow *signal*". As a matter of fact there was a whole series of slow signals given by Probert, and not merely one. Christiansen, respondent's fireman, testified: "He [Probert] kept repeating that slow signal all the way in. He kept repeating the slow signal, moving his fusee slowly back and forth. I have no recollection as to how many times he did it" (Rec. 148).

Christiansen could have meant nothing else by the expression "all the way in", except all the way after the train had entered in the house track. So, it appears that Probert had kept repeating this slow signal, from the place the car he was riding on entered the house track until it reached the place where he gave the washout or violent signal to stop (Rec. 60). This was a distance of about 400 feet.

The use of the fusee is in itself a danger signal, that is, it is used on unusual occasions when it is difficult to see the ordinary signalman's lantern (Rec. 147).

For a distance of 400 feet Probert had been repeating this slow signal, which should have meant to the fireman and engineer, "have your engine under complete control, so that you can stop instantly, and within a few feet, when you get my signal to stop, which is likely to come any second now." The engineer, however, paid scant attention to the repeated warning he was receiving from Probert, and ran his engine in such a manner that when the signal to stop came, the engine ran on for two car lengths, or 80 feet, to the end of the track (Rec. 60) and for 75 feet beyond the end of the track (Rec. 116).

And according to the evidence of Olsen, the engineer, "As long as a brakeman or trainman was giving a slow signal, it would be my duty to keep slowing down slower" (Rec. 143).

This clearly made it a question of fact for the jury to determine whether or not this was negligence of the fireman and engineer, which in whole or in part caused Probert's death. But the Appellate Court says: "While there may be some dispute as to the facts on this phase of the case decisions under the Federal Employers' Liability Act, which are controlling in cases of this kind, are consistently to the effect that if the sole proximate cause of plaintiff's injury or death resulted from his own conduct, it bars recovery" (Rec. 180-1).

We earnestly contend that a careful and full inspection of this record will demonstrate the truth of the proposition that Probert was not guilty of *any* negligence or failure of duty on his part in seeking to set out the bad order car on the house track, and much less was he guilty of negligence that was the "sole and efficient cause of his death."

ARGUMENT.

Petitioner Has a Remedy in This Court.

In a case based on the Federal Employers Liability Act, when a plaintiff has had a verdict and a judgment thereon, in his favor, taken away from him by the decision of an intermediate court of review, on the alleged ground that there was not sufficient evidence in the record to sustain the verdict and judgment, that the plaintiff is not without remedy in this high Court, is shown by two very recent decisions of this Court. In both these cases this Court reversed the judgment of the intermediate Court of review, in one case the U. S. Circuit Court of Appeals for the Eighth Circuit, and in the other the Supreme Court of Missouri.

In the first of these cases, *Seago* v. *N. Y. C. R. R. Co.*, decided by this Court on February 2, 1942, this Court granted a Petition for writ of certiorari and at the same time filed the following opinion:

"Per Curiam. The petition for writ of certiorari is granted and the judgment is reversed on the ground that there was sufficient evidence of negligence for submission to the jury. The case is remanded to the Supreme Court of Missouri for its consideration of other questions presented on the appeal and for further proceedings not inconsistent with this opinion." (62 S. Ct. 806.)

The opinion in the *Seago* case of the Missouri Supreme Court is reported in 155 S. W. 2d. 126. The facts which this Court holds were sufficient to require the submission

of the case to the jury are quite similar to the facts in the instant case and as in the instant case, turned upon the question of the giving of a hand signal in the night time. Concerning this evidence as to the hand signal, the Supreme Court of Missouri says (p. 130):

"In the present case, submission on the theory that no hand lantern back up signal was given, would, we think, 'invite a verdict based on conjecture or speculation.' Since plaintiff failed to make a submissible case, errors, if any, in the instructions need not be considered." But because of this holding by the Missouri Supreme Court, this Court reversed the judgment of the Missouri Court.

In the second of these cases, *Southern Ry. Co.* v. *Stewart*, 62 S. Ct. 616, decided February 16, 1942, two opinions were filed. The majority opinion written by Mr. Justice Roberts, and the minority opinion written by Mr. Justice Black, three other justices joining. We feel at liberty to quote from either opinion in the *Stewart* case, as both opinions hold that the case was one for the jury to decide. The Circuit Court of Appeals for the Eighth Circuit reversed the judgment of the trial court, without remanding the cause for a new trial, just as the Appellate Court of Illinois did in the instant case, on the alleged ground that there was no evidence to sustain the verdict and judgment as to the negligence of the railroad (p. 617). This Court reversed the judgment of the Court of Appeals. The majority was of the opinion that the case should be retried by another jury, and it was so ordered, while the minority was of the opinion that the judgment of the Court of Appeals ought to be reversed, and the judgment of the trial Court affirmed. The latter opinion says at p. 618:

"The jury found from the evidence before it that the railroad had, contrary to the Federal Safety Appliance

Act, used cars 'not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars.' 45 U. S. C., Sec. 2, 45 U. S. C. A., Sec. 2. The trial judge, who alone of the judges in the several proceedings below had the opportunity to see and hear the witnesses as well as to observe a coupling apparatus brought into the court room as an exhibit, made it clear that he regarded the evidence as sufficient to support the jury's verdict both by submitting the issues to it and by denying a new trial. The Circuit Court of Appeals took the same position in its first opinion. 8 Cir., 115 F. 2d 317. Solicitude for the right to trial by jury on issues of fact prompted the adoption of the Seventh Amendment as part of the Bill of Rights. Respect for the institution of trial by jury should, in my judgment, prompt us to leave undisturbed the jury's finding in this case that the coupler was defective.

"Because it must rely on the written page rather than living words, an appellate court can never fully appreciate the effect of testimony heard by a jury of local citizens. Even in the written record, however, I can find support for the jury's finding which convinces me that it should stand."

It appearing that the *Stewart* case had been settled, a petition for rehearing was granted, and the suit directed, by this Court, to be dismissed (62 S. Ct. 616).

Jenkins v. *Kurn*, 313 U. S. 256, decided May 5, 1941, is another recent decision of this Court in a case based on the Federal Employers Liability Act. In the *Jenkins* case the injured employee recovered a verdict of $12,000 in the state trial court. This judgment was reversed by the Supreme Court of Missouri and the case was not remanded for a new trial.

The case involved the giving of a signal of the injured man to the engineer of a locomotive. This Court held that the Supreme Court of Missouri was in error in reversing the judgment of the trial court, and this Court reversed the judgment of the Supreme Court of Missouri.

This Court says in its opinion (p. 258): "The single question is whether the trial court correctly refused to direct a verdict for respondents."

B. & O. R. R. Co. v. *Wilson,* 242 U. S. 295, is an opinion of this Court written by Mr. Justice Holmes in a Federal Employers' case, showing very definitely that where there is any substantial evidence upon which the jury has based a verdict, that the verdict of the jury will not be disturbed; that the verdict of the jury is binding upon this Court. The Court says at page 297:

"The first step in the Railroad's real defense was that the plaintiff was not kept on duty more than sixteen hours, a proposition that there was substantial evidence to maintain. *But that having been overthrown by the verdict,* it contends that the injury must happen during the violation of law. * * * In this case *there was evidence that whether technically on duty or not the plaintiff had been greatly overtaxed before the final strain of more than sixteen hours and that as a physical fact it was far from impossible that the fatigue should have been a cause proximately contributing to all that happened. If so, then by the Employers' Liabiltiy Act, Sections 3 and 4, questions of negligence and assumption of risk disappear.*" (Italics ours.)

The Appellate Court of Illinois in its opinion cites a number of cases as sustaining its decision in the instant case (Rec. 181-2). Three of these cases are effectually

disposed of as not having any application to such a case as we are now presenting to this Court in a decision of this Court, *Rocco* v. *Lehigh Valley R. Co.,* 288 U. S. 275, in which the opinion written by Mr. Justice Roberts says at page 278:

"The Court of Appeals held, as matter of law, that Rocco's negligence was the primary cause of the accident, and therefore the petitioner could not maintain the action. This ruling was made in reliance upon the authorities of which *Davis* v. *Kennedy,* 266 U. S. 147, 45 S. Ct. 33, 69 L. Ed. 212; *Unadilla Valley Ry. Co.* v. *Caldine,* 278 U. S. 139, 49 S. Ct. 91, 73 L. Ed. 224; and *Southern Ry. Co.* v. *Youngblood,* 286 U. S. 313, 52 S. Ct. 518, 76 L. Ed. 1124, are typical. These were cases where a member of a train crew was killed as a result of disregarding orders to wait at a given point until a train moving in the opposite direction had passed. In each of them the decedent's negligence was the proximate and efficient cause of the accident; in each it was sought to show that the fatality was in part due to alleged negligence of some other employee in omitting to give the decedent an order which would have reminded him of the orders previously given and by which he was bound. In none was there any negligence on the part of employees operating the train moving in the opposite direction, with which the collision took place. These decisions are not controlling in the present case."

None of the cases cited by the Appellate Court is any authority whatsoever for holding as this Court has done that Probert's death was caused by the sole negligence of himself. In fact neither of those cases is even persuasive because neither is analogous to the case at bar, by reason of the facts being entirely different. In each of those cases the injury or death was caused solely by the violation of some rule, statute or positive duty of the injured person.

CONCLUSION.

The last of the 34 cars in the train at Lake Bluff was a bad-order car. The bad-order car was discovered by the conductor at Waukegan, and it was during his attempt to set the bad-order car out at Waukegan that the train became separated. At Lake Bluff, Probert dropped off the head end of the train and waited until the train went past him and then discovered that the last car was a bad-order car and got on it for the purpose of setting it out on the house track. When the train had pulled south past the switch to the house track, he gave a signal for the train to stop. He then had to get off of the car and open the switch for the train to back into it so that the bad-order car could be left on the house track. He then climbed upon the bad-order car again and gave a signal which the fireman relayed to the engineer to back the train onto the house track. Not knowing about the bad-order car, the engineer apparently assumed that he was backing a 34-car train onto the passing track. Probert immediately started to give slow signals, as he knew that the house track was only long enough to hold about 12 or 13 cars. Each slow signal required the engineer to slow down the train, but the engineer believing that he had to travel a total distance of more than 34 car lengths, *disregarded the slow signals* and kept on going backwards. If he had obeyed the previous slow signals which Probert gave when he received the stop signal from Probert, the train could easily have been stopped and the bad-order car set out on the house track as Probert intended to set it out. The cause of the accident was the failure of the engineer to obey the slow signals given by Probert and relayed to the engineer by the fireman.

The Illinois Appellate Court (Rec. 182) erroneously concluded that Probert was trying to put 34 cars on the house track, which Probert knew only had room for 12 or 13 cars.

This assumption can only be based on the further assumption that Probert had suddenly become bereft of all reason. On the contrary, Probert was a sensible man and a railroad brakeman and conductor of 16 years' experience. He was familiar with the house track and knew that it had room for only about 12 or 13 cars. The only possible explanation of the movement as directed by him was *to set out the bad-order car on the house track.* This was not in violation of the order given by the dispatcher. It was simply an essential movement which Probert had to order, on his own initiative, before carrying out the order of the dispatcher. This Court, which has passed upon many cases brought under the Safety Appliance Act, well knows that one of the most essential duties of a railroad and its employees is to detect bad-order cars and as soon as possible put them in a position where they will not cause accidents and injuries. This was what Probert was trying to do, and would have done with safety to all persons concerned, had the engineer and fireman obeyed his slow signals, as it was their duty to do.

The further question may be asked as to why Probert was setting out the bad-order car on the house track, rather than on the passing track with the rest of the train. At the blind end of the little used house track the bad-order car would be out of the way and would not interfere with any other movements as the only entrance to the house track was from the south. The passing track was used more, was a much longer track, and the placing of the car on the passing track would have been a hazard, an obstacle to movements of other trains, and also

it would have been an obstacle in the further movement which this train would have had to have made after the trip to Waukegan and back. The primary use of the passing track, as its name implies, was for trains to be placed temporarily upon it while other trains were passing on one of the through tracks.

Respectfully submitted,

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(19)

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IN THE

Supreme Court of the United States

October Term, 1941

No. 1157.

ROBERT A. HELTON, Administrator of the Estate of Walter J. Probert, Deceased,

Petitioner,

vs.

CHARLES M. THOMSON, Trustee of Chicago and North Western Railway Company (Substituted for Charles P. Megan, Trustee, and Chicago and North Western Railway Company),

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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Of Counsel.

MCCORMICK AND HENDERSON, INC., CHICAGO

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INACCURACIES AND OMISSIONS.

The statement of the case by the court below (Rec. 173-180) is more accurate, reliable and complete than that of petitioner. In the latter the following, among other inaccuracies and omissions appear:

1. At top of p. 5 the petition states that the so-called "passing track" was "not always" used for holding one

train for the passage of another. The record shows it was hardly ever used as a passing track, but mostly, if not entirely, for various other purposes (Rec. 79, 80, 122, 123). This is important in connection with the testimony of Helton, the plaintiff, later referred to, that practically all of his testimony was based upon the assumption that it was used *exclusively* as a passing track.

2. In the second paragraph of p. 5 the petition says that "two ordinary railroad ties were laid across the rails of this track at its north end." Although of no particular importance, the evidence is that the inside ends of the two ties were sunk in the ground between the permanent ties of the roadbed, to anchor them in place (Rec. 115, 116, 119, 121, 123-5).

3. The third paragraph of p. 5 of the petition omits practically all of the important part of what took place at the time therein referred to, namely: after receipt of the train dispatcher's written order to set out the part of the train then and there present, Probert read the order aloud to the two enginemen, then handed it to the engineer, to whom it was addressed, who read it aloud to the fireman and Probert; then the engineer and Probert, in the presence of the fireman, discussed the operations necessary to carry out the order (Rec. 137), and the engineer advised Probert that he would pull south, and ordered Probert to get off the engine as it passed the pot or dwarf signal, at the south end of the interlocking plant, and to stay there until the rear car cleared that signal, and then to signal for the train to stop, and then when that electrically operated dwarf or pot signal gave the indication that it was lined up for the passing track, to signal the enginemen to back up (Rec. 138). The train then moved south and Probert dropped off the engine at the pot signal (Rec. 138). But in disobedience of the written order of the dispatcher and

the spoken order of the engineer, he did not stay there, but proceeded south, in the direction of the movment of the train, to the housetrack switch, about 400 feet south of the pot signal, where he then gave the signal to stop, bringing the train to a stop with its rear car south of that housetrack switch. The enginemen were then between a quarter and a third of a mile (being the full-length of the train) away from him (Rec. 87) and they of course assumed that when he gave the stop signal he was at the pot signal, where he had been ordered to be and should have been. Here please note the inconsistent and wholly inaccurate statement, in this paragraph 5 of the petition, that "Probert waited on the ground while the train proceeded southward a sufficient distance to back into the passing track. *While in this position* [at the pot signal] and when the last car on the train was south of the points of the housetrack switch, Probert stopped the train by signalling the engineer." This was not possible, for the housetrack switch was 400 feet from the pot signal, it was black dark (Rec. 47, 114) and there was no light on the housetrack switch (Rec. 143-4). When he gave that stop signal he was at the housetrack switch.

4. Having made that impossible statement, the petition then proceeds to say, in the last paragraph on p. 5, that Probert then, "*at this point*," discovered that the "bad order" car was in the train. This is another impossibility, for the so-called "bad order" of that rear car consisted only of its having been cut off from the train line brakes, which fact Probert could not have "discovered" until after he had left his post, gone to the housetrack switch and from there had given the stop signal and the engineer had applied the brakes. He might then have noticed that the brakes did not apply on that car, but that would not be apparent until after that rear car had passed the housetract switch and he had given the stop signal. It is obvious

that before he *could* "discover" that the brakes on that car had been cut off he had left the pot signal and gone to the housetrack switch; that before he could have made any such "discovery" he had decided to and had proceeded to disobey his orders and back the train onto the housetrack.

5. In the petition, p. 7, paragraph numbered 5, there is a misstatement which has appeared in other briefs of plaintiff in the state courts, namely, that in the absence of the conductor and rear brakeman Probert was in charge of the train. On his redirect examination Helton, plaintiff, had (inadvertently, perhaps) said something of the kind, in response to a leading question, but on his later re-cross examination he emphatically repudiated any intention to so testify, and repeatedly stated that in the absence of the conductor the engineer was in charge of the train, and that train orders would be directed to him only, "and he would be the fellow, absolutely, who would direct the movement, and the head brakeman wouldn't have any authority over him at all, or have any such authority as the conductor has when he is present" (Rec. 37).

This same misstatement appears elsewhere in the petition. See pp. 11 (bottom), 12 (middle), 17 (bottom). There would see to be no excuse for making it. Its obvious purpose is to mislead to the belief that Probert had the right to "set out" the "bad order" car, just as the conductor was doing at Waukegan, when he was interrupted by Probert's false report to the engineer and fireman that he had received a signal to pull out of town, which was the cause of the leaving of part of the train, and the conductor and rear brakeman, at that place. But there was no similarity in the situations, as fully explained by Train Dispatcher Shavel, on cross examination, Rec. 112.

6. Petition, p. 7, paragraph 8, p. 8, par. 2. It is inaccurate to say that the decision of the court below deprives

the petitioner "and the widow and minor son of Probert" of their right to trial by jury.

7. Commencing with the last caption on p. 10 the petition makes many inaccurate statements, among them the following:

(a) Paragraph commencing at bottom of p. 10. That it would take much more work, time and trouble to put the "bad order" car on the passing track, and much more labor, expense and trouble to later take it out and repair it. This is contrary to the testimony of the witnesses, including Helton, the plaintiff (Rec. (Helton) 26, 41; defendant's witnesses: Rec. 71, 80, 86, 87, 104, 111, 129, 130). It would not be necessary to "take it to the shop or to a repair track to repair it." It could be repaired right there on the passing track (Rec. 80).

(b) First full paragraph, p. 11. Although Helton testified as stated it was not in connection with the facts and circumstances of this case. Parenthetically, Helton should not have been allowed to testify to any matters of defendant's operating practices. The trial court's theory was that because he said that he was a train dispatcher for another railroad he was an expert (Rec. 11, 13) as to all dispatching and operating practices on defendant's railroad, although he further testified that he never was a dispatcher on any other road than the Milwaukee, never worked as a trainman, and was not familiar with practices on defendant's railroad, either operating or dispatching (Rec. 19-20). Furthermore, Probert had no right of selection as between the two tracks, and had no authority or duty to "set out" the "bad order" car.

(c) Petition, p. 11, second paragraph. As last above indicated, Probert had no authority or duty to choose between the two tracks. The statement that putting the 34

cars on the passing track, as ordered by the dispatcher and the engineer, "would have produced confusion" is not only "inaccurate," but is contrary to the undisputed facts (Rec. Helton, 23-4, 27, 28, 30, 31, 32; defendant's witnesses, 68, 69, 71, 74, 80, 84-5, 86-8, 93, 97, 101, 102-3, 104, 110-112, 128, 129-30).

(d) Petition, p. 11, third paragraph. Authority for this statement is found commencing at the bottom of p. 35 of the Record. But standing alone it is misleading. Helton also testified to the exact contrary (Rec. 23, bottom; 24, top; 26, bottom; 27, top and bottom). And he entirely repudiated the statement as applied to this case, testifying that his answers were "absolutely based on the fact that this track is called a passing track * * * is used exclusively for passing track, and my answers would be different if I knew it was used for other purposes" (Rec. 40, lower half). It is uncontradicted that although the track is *called* a passing track it is in fact a "stub" track rarely used as a passing track, its constant and common use being storage of cars, setting out bad order cars, housing bunk cars of extra gang laborers, etc. (Rec. 79, 80, 122-3). Furthermore that track and its switch were part of the interlocking plant, the switch being electrically operated by the towerman. See also Helton's testimony, Record, last fourth of p. 27 and top third of p. 28.

(e) Petition, p. 11, fourth paragraph. This is a morsel selected from the deposition of the conductor and is without any bearing on or connection with the issues in this case. It was followed (Rec. 46) by his statement that "If we have a specific order to place a car or string of cars we follow the order." And it is to be noted that the quotation in the petition omits part of what the witness said, namely, that "where switch engines are employed" (Rec. 46, top half).

(f) Petition, p. 11, last paragraph. There are three misleading inaccuracies in the paragraph: On the page of the Record (28) referred to the witness (Helton) testified that, in the absence of instructions, the brakeman, upon discovery of a bad order car in his train would set it out, and that obeying the dispatcher's and engineer's orders in this case would have resulted in setting out this bad order car (Rec. 30); "Where the conductor and rear brakeman were left behind it would be the duty of the head brakeman (Probert) to take charge," etc. This is not so, as Helton very emphatically stated (Rec. 37); that the engineer "would be the fellow, absolutely, who would direct the movement (Rec. 37); and Helton also testified (Rec. 30) that the putting of the train on the passing track, as ordered by the dispatcher and the engineer would have accomplished the same result as "setting out" the 34th car on the housetrack (Rec. 23), but more safely (Rec. 21), more expeditiously (Rec. 23), and that in ordering this train onto the passing track the dispatcher exercised good judgment (Rec. 31, bottom, 32, top).

(g) Petition, p. 12, second paragraph. Here is repeated the testimony of the conductor upon which we commented in our paragraph (e), supra.

(h) Petition, p. 12, third paragraph. This is a rehash of the inaccuracies we have commented upon in foregoing paragraphs.

(i) Petition, p. 13, second paragraph. The witness Larson, his attention being called to the facts of this case, very definitely qualified the testimony referred to in the petition, saying that a trainman would have no right to choose a track if, as here, he had had instructions from the dispatcher to "put the train on a particular one" (Rec. 74).

(j) Petition, p. 13, fourth paragraph. This is a rather amazing "inaccuracy." We do not deny that in certain

circumstances it might have been proper to "set out" the "bad order" car on the housetrack, but nobody testified that it would have been proper for Probert to set it out on that track in the circumstances that existed at the time in question. Even Helton testified that there was no excuse for what Probert seems to have been trying to do unless he had first discovered that the rear car was bad order (that the brakes were not setting on it), admitting that as to that he was "speculating" when stating a preference for the housetrack over the passing track, and that of course he didn't know what the facts were at all (Rec. 32). He also testified that the car was not dangerous to haul (21), that it would be "absolutely a good deal safer to use the passing track" (21), that trainmen must not use their own judgment when they have had orders from a dispatcher, but that if they think the orders improper they must get in touch with the dispatcher (22); that train dispatchers' orders "are to be explicitly obeyed in all circumstances if it is possible to do so," as it was here (23). He also testified that all of his testimony attempting to justify Probert's disobedience was based upon his assumption that because the track ordered to be used was *called* a passing track it was used *exclusively* as such, *i.e.*, for trains to go in and allow other trains to pass; that his testimony would be different if it were called a storage track (which, among other things, it was), or if it were called a stub-end switch track (which, among other things, it was); that his answers were "absolutely based on the fact that [because] this track is *called* a passing track, * * * that it is used exclusively for passing track, and my answers would be different if I knew it was used for other purposes" (Rec. 40). As before pointed out, the track was scarcely ever used as a passing track, its main uses being that of a storage track, as a stub-end switch track,

for setting out bad order cars, etc. (Rec. 79-80, 122-123, 127). Several witnesses testified that, in the circumstances of this case "it would be *improper* to set out the bad order car on the housetrack" (Rec. 63, 64-74, 82-4, 85-7, 92-3, 99-100, 100-01, 102, 103-4, 107, 110-12, 128, 129, 130).

(k) Petition, p. 13, bottom, 14, top. This is both inaccurate and frivolous. Nobody knows what Probert had in mind, or whether or not he "was attempting to put 34 cars on a track that would only hold 10 or 12." Whatever it was that he had in mind, the fact is that, on his own motion, and in flagrant disobedience of the orders of the train dispatcher and the engineer, he left his post at the pot signal, went to and unlocked and threw the housetrack switch, and then signaled the enginemen to back the train into that track. There is nothing in the opinion of the court below indicating anything else.

There are other inaccuracies on pages 14 and 15 of the petition, the next of importance beginning at the bottom of p. 15. It consists of saying that the record shows that after Probert left the engine "with the intention of guiding the train into the passing track, in accordance with the message of the train dispatcher" he "then discovered the serious, bad condition of this car." The statement is contrary to the evidence. After the order of the dispatcher was received and read by Probert and the enginemen, the engineer, to whom it was addressed, and who was then, in the absence of the conductor, in charge of the train (Helton, Rec. 37) ordered Probert to alight from the engine as it passed the pot signal, and when the rear car cleared the pot signal to give the enginemen a stop signal. If Probert had stayed at the pot signal, as ordered to do, it would have been physically impossible for him to "discover" the condition of the rear car, which was neither serious nor bad. Its condition simply was that it was cut

off from the trainline brakes, and was in no way dangerous to anybody or to the train while it was the rear car of the string (Helton, Rec. 21, 41). There would be no indication of its condition while the train was moving, but a person on the ground, by careful observation, might discover it when the brakes were applied by the engineer, by noting that the brake-shoes did not press against the wheels as the train was brought to a stop. There was, at the time in question, but a single movement of the train, namely, south, to clear the pot signal (Rec. 141, bottom, cross examination of engineer Olson). When that movement started the rear car was the whole length of the train north of the pot signal. If Probert had been at the pot signal the rear car would have passed him without any indication whatever that there was anything wrong with it. Indubitably, he was not at the pot signal when the rear car passed it, for he didn't give his signal to stop that movement until the rear car had cleared the housetrack switch, over 400 feet south of the pot signal (Rec. 141-2). It follows that he had determined upon the strange course he took before he *could* have discovered that the brakes on the rear car had been cut out of the air line.

(1) Petition, p. 16, last paragraph. The witness Glasscock did not in any sense admit that Probert was justified in what he did. The petition's Record reference is to pp. 93-5, a reading of which demonstrates the "inaccuracy" of the petition. Incidentally, he was asked an improper question (Rec. 93, lower half of page) and our objections to it (Rec. 94) should have been sustained. The question contained two irrelevant assumptions, namely, (1) that the hypothetical trainmen discovered something wrong with some part of their train where it would be absolutely necessary to get that part of the train or the whole train in the clear, and (2) when they would have no way of com-

municating with the dispatcher. And see the trial judge's interpretation of the question as intending to assume "an emergency" (Rec. 94). Every witness who testified on the subject, including Glasscock (Rec. 92, bottom, 93, top, down to middle) and Helton (Rec. 21, bottom half, 22, bottom half, 23, top quarter and bottom half, 26, two bottom lines, and 27, three top lines, 27, bottom one-third, 28, bottom one-fourth, 30, lower half, 31, last five lines and 32, first three lines, 32, just below middle) stated that in the circumstances shown in the record in this case the condition of the rear car created no necessity whatever to get any part or the whole of this train "in the clear," did not create any emergency, and it is wholly undisputed that right there at hand, in the interlocking plant, was the dispatcher's telephone, affording exclusive and convenient communication with the dispatcher (Rec. 71, bottom, 72, top, 79, top, 85, last three lines, and 86, first four lines, 89, bottom third, 102, 107, bottom four lines).

(m) Petition, p. 17, second paragraph. Rule 964 would not have been violated if Probert had obeyed his orders. Reading it, as it is quoted in the petition, demonstrates this. Those orders were not that he put the rear car on the so-called passing track and leave it there, but to temporarily put the 34 cars there. The purpose being to get the whole train together again and in charge of the conductor. This "inaccuracy" is a quibble.

(n) Petition, p. 17, last paragraph. It seems to us to be more than merely inaccurate to say that Probert "had no means of communicating with any dispatcher." And it is almost as bad to say that he could not communicate with the engineer except by signals. There was no "dangerous car" in the train. Because even Helton testified to the contrary (Rec. 21), the repetition in the petition of this "dangerous car" inaccuracy might reasonably call

for stronger language than we wish to use. If that rear car *was* dangerous, it was just as much so in connection with backing it into the housetrack as it would have been in backing it into the passing track. Furthermore, Probert had no duty to "set it out." That would have been up to the conductor after the engine had gone to Waukegan and brought him and the marooned eight cars down to Lake Bluff, where he then would reassume charge of the whole train and its crew. It must be assumed that if then *he* decided or was ordered by the dispatcher to leave the rear car on the passing track he would do so in accordance with defendant's rules, but that would be strictly his business, not Probert's.

(o) Petition, p. 18, second paragraph under the boldface type. The witness Christensen, the fireman, did not mean that Probert gave his slow signals all the way after the train had entered the housetrack. He said that the next signal he got after the train started backing up, presumably into the passing track, was a slow signal, after which that signal was repeated all the way in. At this point in his testimony he did not say how far the train had moved before he got the first slow signal, and it is of no importance or significance anyway. He testified that the slow signal meant that the man giving it wanted the speed retarded to some extent, that he at once relayed each signal to the engineer, who acted upon it at once. Furthermore, as a part of his case, plaintiff introduced in evidence the deposition of this witness, Christensen (Rec. 58-62), in which he testified that he should judge that before getting the slow signal the backup movement had progressed for about five or six car lengths. There is no dispute that a car length is something over 40 feet, so that movement preceding the first slow signal had continued into the housetrack for about 250 feet (Rec. 60); that after that

the engineer backed up easy; he cut down on the speed (Rec. 60). The engineer, Olson, testified to that distance as being "maybe eight or nine car lengths, seven car lengths, something like that" (Rec. 139, just below middle).

Petition, p. 19, first paragraph. This paragraph is composed of inaccuracies. The quotation as to what the slow signal should have meant to the enginemen is not to be found in the record, and is obviously inconsistent with other statements in the petition to the effect that Probert commenced giving slow signals at once after the backward movement started. If the slow signal meant, as the petition says, that the enginemen should expect a stop signal "any second now," if he kept repeating it over a distance of 400 feet, it was like the "wolf, wolf" cry of the well-known fable. However, as already pointed out, the movement had progressed for from five to nine car lengths before the first slow signal was given (Rec. 139), and the slow signals were promptly interpreted and acted upon by the enginemen. In this connection it should be remembered that the enginemen knew that the passing track was clear (empty) (Rec. 61, 62), that it held 50 to 60 cars, and that they had no reason to suspect that Probert was taking them into the little housetrack. Neither is there any authority in the record for the second sentence in this paragraph of the petition. The engine did not run on for two car lengths before coming "to the end of the track," plus 75 feet "beyond the end of the track." It is true that in his deposition the fireman said that "when we got the stop signal we could not have been over two cars at the most from the end" (Rec. 60), which was a mere conclusion as to a maximum and in no way weakens his or the engineer's testimony that all of Probert's signals were promptly relayed and promptly acted upon (Rec. 60, 139, 147, bottom, 148-9). The evidence is that the final signal—

a violent stop signal, or emergency, or "wash-out" signal—was relayed and acted upon at once, the full or emergency braking power applied, and almost at once the rear end of the train hit the bumper at the end of the track and moved but 75 feet (Rec. 116, middle) before coming to a rest. The towerman, Arquilla, who saw the "wash-out" signal given, testified that when given "the rear car was then right at the end of the housetrack" (Rec. 151, bottom half).

ARGUMENT.

The petition, as hereinbefore indicated, bases its prayer upon omissions, inaccuracies and misleading statements. The opinion of the court below is correct and was passed upon and in effect approved by the Supreme Court of Illinois in denying leave to appeal. *Soden* v. *Claney*, 269 Ill. 98, 102. There is no substantial reason why it should be reviewed by this court. It contains one inaccurate statement of fact, probably inadvertent or clerical. About one-third of the way down on p. 178 of the Record, in discussing the signals given by Probert while the train was on the housetrack, it says that the next signal after the slow signals "was a stop signal, *then* a fast stop signal, *and finally* an emergency signal (what they call a 'wash-out,' which means stop at once)." The fact is that after the slow signals had been given and acted upon, there was but *one* stop signal given, it being the so-called "wash-out" signal (Rec. 139, 147).

There seems to us to be no merit in petitioner's "Argument," pp. 20-24 of his petition. He avoids discussion of the ruling cases, and seems not to get the point of those he cites—for instance, there is no recognizable similarity in the case at bar with *Stewart* v. *Southern Ry. Co.*, 62 Sup. Ct. 616. The admirable language the petitioner quotes from the dissenting opinion in that case cannot be criticized, but it has no bearing here. This is so obvious as to need no comment. The *Seago* case, 62 Sup. Ct. 806, came to this court with a conflict in the evidence as to whether a certain hand-lantern signal had been given, and this court, as to that, said "that there was sufficient evidence of negligence for submission to the jury." In the case at bar there is no conflict in the evidence as to any material fact. The petitioner makes much of language he

quotes from the opinion of the court below (petition, p. 18), but indicates an implication not intended by the court. The language (Rec. 180, bottom) was used in connection with the statement that "The administrator and his counsel *argue*" that the enginemen "were negligent in not slowing the train down more when Probert gave the slow signal * * * and in not stopping the train immediately when the 'wash-out' or emergency signal was given immediately preceding the accident" (Rec. 180, bottom). Then occurs the language stressed by petitioner: "While there may be some *dispute* as to the facts on this phase of the case," etc. In other words "dispute" or "argument" between or by counsel. However, there is no evidence or inference from evidence that the enginemen were negligent in the respect claimed. Theirs is the only testimony on the subject and there is nothing in or about it that makes it questionable. As above pointed out, they acted promptly and at once on each of Probert's signals, and there is no evidence to the contrary. The mere fact that the rear car ran 75 feet after the brakes were applied is not proof that the train could have been stopped in any shorter distance. Even if it ran 155 feet, as now argued by petitioner, yet it cannot be said that a jury could reasonably infer that, contrary to the testimony of the enginemen, the signals were not properly acted upon or that this 34-car freight train, being pushed by a heavy road locomotive, could have been stopped, if moving at all—at any imaginable rate of speed—in a shorter distance than it was stopped. And the testimony of the eyewitness, Arquilla, the towerman, that the rear of the train was right at the end of the track when the "wash-out" signal was given, is uncontradicted and stands proved. Petitioner's argument on this is quite the same as was made by plaintiff in *Brennan* v. *B. & O. R. Co.*, 115 Fed. (2d) 555, 557

(Nov. 1940), except that in that case the argument was bolstered by the testimony of a witness who testified that the derailed cars could have been stopped in a shorter distance than they were. The court gave the argument careful consideration and discussed it (p. 557, paragraph [2-4]) but held that the contradiction with which it dealt was not substantial and did not present a jury question.

Jenkins v. *Kurns*, 313 U. S. 256, is widely different as to facts (the engineer having failed to act at all upon the hollered warning of plaintiff). The lower court held that plaintiff had failed to prove what Justice Murphy called "the engineer's subjective comprehension and correct interpretation" of the warning, "the subjective reactions in the engineer's mind." There is nothing of that kind in this case.

Baltimore & Ohio Railroad Co. v. *Wilson*, 242 U. S. 295, is far afield. On facts like those in the case at bar this court, in an opinion by Justice Holmes, upheld our every contention here.

The opinion in the case of *Rocco* v. *Lehigh Valley R. Co.*, 288 U. S. 275, is not at variance with the long line of decisions in cases like the one at bar, as is pointed out by its writer, p. 278.

Before proceeding further we again call attention to the fact that petitioner's case always has depended solely upon the testimony of Helton, administrator, the plaintiff. Most of his testimony was inadmissible, but we do not here labor that point. Although his testimony was permeated with self-contradictions and admissions of incompetence, he conceded that he was relying basically upon first, pure speculation as to the facts (Rec. 32), and second, upon the assumption (proved to be false) that the so-called passing track was used exclusively as a passing track (Rec. 40, bottom half).

Even should we concede (which we do not) that petitioner's two contentions as to the facts are sound, yet the respondent would not be legally liable for the death of petitioner's intestate. (1) If, after he had received his orders, he had discovered that the brakes on the rear car had been cut off from the train line, and (2) that it thereupon became his duty to "set out" that car, his conduct still was the sole, the efficient, the primary cause of his death. This, because, in "crass disobedience" of his orders, without communicating with his then superior, the engineer, or with the easily reached dispatcher, he proceeded to pilot this train, without rhyme or reason, into the little housetrack instead of into the adequate and safe passing track. Any "duty" to "set out" the rear car certainly did not either require or excuse such conduct. What he did was grossly negligent and was the sole proximate cause of his death.

The claim of negligence of the enginemen is without support in the record. In the "Conclusion" of the petition (pp. 25-27) petitioner says that the engineer "apparently assumed that he was backing a 34-car train onto the passing track," and "but the engineer believing that he had to travel a total distance of more than 34 car lengths," etc. But he then arrives at a false conclusion, saying that because of that assumption and that belief the engineer "disregarded the slow signals." The evidence is against that conclusion, and is uncontradicted. But even if it were true that the conclusion is correct—even conceding that the engineer disregarded the slow signals—yet his negligence (if it were negligence) in that respect is not actionable under the ages-old rule of law, established by this court in *Milwaukee, etc.* v. *Kellogg*, 94 U. S. 469, and ever since adhered to, that in order to warrant a finding that negligence is the proximate cause of an injury it must ap-

pear that the injury was the natural and probable consequence of the negligent or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances.

The "Conclusion" part of the petition (pp. 25-27) repeats several of the inaccuracies already referred to and should be read in the light of those references. Some of the inaccuracies are worded somewhat differently than elsewhere in the petition. The last paragraph, beginning at the bottom of p. 26, has no foundation in the evidence, and its last sentence, if deliberately made, condemns the whole petition.

THE RULING CASES.

For many years it has been the settled law that under the Federal Employers' Liability Act there can be no recovery for death or injury caused by or occurring while the employee was engaged in disobedience of an unrevoked or superseded order, even though other employees had failed to do all they might have done to prevent the death or injury.

Great Northern Ry. Co. v. *Wiles,* 240 U. S. 444, 448;
Southern Ry. Co. v. *Gray,* 241 U. S. 333;
Frese, Admx. v. *C. B. & Q. R. R. Co.,* 263 U. S. 1, 3;
Davis v. *Kennedy,* 266 U. S. 147-9;
Unadilla Ry. Co. v. *Caldine,* 278 U. S. 139, 142;
Atlantic Coast Line v. *Davis,* 279 U. S. 34, 39;
A. C. L. R. Co. v. *Driggers,* 279 U. S. 787, 791-2;
Pheasant v. *Director General,* 285 U. S. 342, 345;
St. Louis & S. W. Ry. Co. v. *Simpson,* 286 U. S. 346;
Southern Ry. Co. v. *Dantzler,* 286 U. S. 318.

Those cases made the law. It is the law. Those decisions have been followed by the Circuit Courts of Appeals in many cases, some of them being:

Unadilla Valley Ry. Co. v. *Dibble,* 31 Fed. (2d) 239;
Bradley v. *N. W. P. R. Co.,* 44 Fed. (2d) 683, 685;
Pere Marquette Ry. Co. v. *Haskins,* 62 Fed. (2d) 806;
Van Derveer v. *D. L. & W. R. Co.,* 84 Fed. (2d) 393, 395;
Sheehan v. *N. Y., N. H. & H. R. Co.,* 93 Fed. (2d) 442, 444.

As heretofore stated, the decision of this court in the *Rocco* case, 288 U. S. 275, 278, in no way changes or was intended to change the law. Itself distinguishes that case from them. As pointed out by Judge Hahn, in *Hylton* v. *Southern Ry. Co.,* 87 Fed. (2d) 393, in the *Rocco* case the order violated did not require that the employee wait where he was, but allowed him to proceed on his way after obeying the order.

"A failure to stop a man from doing what he knows that he ought not to do, hardly can be called a cause of his act." Justice Holmes in *Unadilla* v. *Caldine,* 278 U. S. 139, 142. "Beyond peradventure respondent's intestate disobeyed a definite order which was not revoked or superseded by any other orders, verbal or written. * * * This crass disobedience of operating orders was the sole cause of the intestate's death." Justice Roberts, in *Southern Ry. Co.* v. *Youngblood, Admx.,* 286 U. S. 313, 316. "It seems to us a perversion of the statute to allow his representative to recover for an injury directly due to his failure to act as required on the ground that possibly it might have been prevented if those in secondary relation

to the movement had done more." Justice Holmes, in *Davis* v. *Kennedy*, 266 U. S. 147, 148-9. "There is an absence of the essential factors that wake into life the doctrine of the last clear chance. * * * Negligent he [the conductor who, it was claimed, might have prevented the consequences of plaintiff's disobedience] may have been, but not recklessly indifferent to a duty to counteract a peril *perceived and understood.* * * * The negligence of the engineer [plaintiff] was a continuing one. * * *" Justice Cardozo in *St. Louis S. W. Ry.* v. *Simpson*, 286 U. S. 346, 350-1.

We think it clear that the case at bar is squarely within the rule of those decisions, and that there is nothing to be gained by its review. There are here no special or important reasons for review by this court. The judgment of the court below is in accord with the applicable decisions of this court.

Respectfully submitted,

WILLIAM T. FARICY,
Attorney for Respondent.

NELSON J. WILCOX,
Of Counsel.

(20)

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1941.

No. 1157

ROBERT A. HELTON, Administrator of the Estate of WALTER J. PROBERT, Deceased,

Petitioner,

vs.

CHARLES M. THOMSON, Trustee of Chicago & North Western Railway Company (Substituted for Charles P. Megan, Trustee, and Chicago & North Western Railway Company),

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS.

REPLY BRIEF OF PETITIONER.

CHARLES C. SPENCER,
HARRY A. BARNHARDT and
RICHARD M. SPENCER,
Counsel for Petitioner.

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If the Court Please:

We avail ourselves of the privilege granted by Rule 38, 4, (a), of filing a short reply brief.

A New Decision By This Court.

The decision of this Court in *Jacob* v. *City of New York*, 62 S. Ct. 854, was filed March 30, 1942, and was published on April 15, after our brief in the instant case was written.

In the *Jacob* case, for the third time within less than three months (*Seago* v. *N. Y. C. RR. Co.*, 62 S. Ct. 806; *Southern Railway Company* v. *Stewart*, 62 S. Ct. 616; *Jacob* v. *City of N. Y.*, 62 S. Ct. 854) this Court granted certiorari on behalf of the respective plaintiffs and reversed the judgments of the intermediate courts of review, in favor of the respective defendants, upon the ground that the intermediate court of review wrongfully held that the plaintiff had not made out a submissible case in a suit based upon the provisions of the Federal Employers Liability Act. In the *Jacob* case, the action was brought upon the Jones Act, which embodies the provisions of the Federal Employers Liability Act, and the case is, therefore, in fact, based upon the provisions of the latter Act.

In deciding that the case should have been submitted to the jury, and in reversing the judgment of the lower court, this Court through Mr. Justice Murphy says (62 S. Ct. 854):

"The right of jury trial in civil cases at common law is a basic and fundamental feature of our system of federal jurisprudence which is protected by the Seventh Amendment. A right so fundamental and sacred to the citizen, whether guaranteed by the Constitution or provided by statute, should be jealously guarded by the courts. The present case is a suit by petitioner under the

Jones Act for personal injuries sustained when he fell because the wrench he was using to tighten a nut slipped under the torque applied to it. We are called upon to determine whether on the evidence adduced by petitioner, and in contravention of accepted juridical standards, petitioner was wrongfully deprived of his statutory right to jury trial by the action of the trial court in dismissing his complaint, thereby refusing to submit the case to a jury which had been duly empanelled to try it."

This Court then considers the evidence in the case and holds that it was sufficient to entitle the petitioner to have had the case submitted to the jury, and reverses the judgment of the Circuit Court of Appeals, for the Second Circuit, for holding the contrary (62 S. Ct. 855-857).

The petitioner in the instant case, who was plaintiff in the trial court, is in a decidedly more advantageous position to entitle him to relief by this Court, than he would have been, had the trial court simply directed a verdict against him and in favor of respondent.

In the instant case the trial court three times considered the question of whether or not the evidence introduced by petitioner entitled him to have his case submitted to the jury. First, at the close of plaintiff's evidence, the court considered the motion of respondent to direct the jury to return a verdict in his favor, but the court determining that there was substantial evidence in the record to sustain a verdict in favor of petitioner, denied this motion of respondent (Rec. 62). Second, counsel for respondent again, at the close of all the evidence, made a motion to direct a verdict for him, but after consideration by the court, this motion was again denied (Rec. 155).

Third, after the verdict of the jury in favor of petitioner, respondent moved the court for a new trial, but the trial judge, holding that the verdict of the jury was not against the manifest weight of the evidence, overruled the motion for a new trial and entered judgment on the verdict. Fourth, and perhaps most important of all, the jury, after careful consideration of all the evidence, rendered a verdict in favor of petitioner for $13,500 (Rec. 165).

A jury of local citizens, whose verdict is approved by a trial judge, who, as well as the jury, has the advantage of seeing the witnesses and hearing them testify, is the fact finding body, under the Constitution and law of the United States (7th Amendment of the Federal Constitution; *Southern Railway Co.* v. *Stewart*, 62 S. Ct. 616, 618) as well as under the Constitution and law of the State of Illinois, (Constitution of Ill. 1870, Art. II, Sec. 5; *Mirich* v. *Forschner Contracting Co.*, 312 Ill. 343) and not a court of three judges, who sitting behind closed doors, merely examine a printed record prepared by the losing party in the trial court.

If there is any substantial evidence in this record sustaining the verdict of the jury, (and who can say there is no such evidence after a careful examination of this record?) then the Appellate Court of Illinois, substituting its judgment for that of the jury and trial judge, has effectually nullified the right of trial by jury of the widow and minor child of Probert, and the Supreme Court of Illinois has perpetuated this wrong, by denying petitioner's leave to appeal (Rec. 171), and their only remedy is in the supervisory right of this Court of the judgments of the state courts.

Counsel for respondent devote pages of their brief (pp. 1 to 14) to what they are pleased to term "**Inaccuracies** and **Omissions.**"

We believe it would be an imposition on the Justices of this Court to attempt here to answer *seriatim*, these alleged claims. On a few of the high points in the case we do wish, here, to make some brief comments.

It is a gross perversion of the facts in the instant case to say that the train dispatcher, ordered Probert to set out the bad order car on the passing track. The message sent directed Probert to put the "part of the train you now have on east passing track," while the engine went to Waukegan, 5 miles away, and got the back part of the train that had been left there, and bring it to Lake Bluff. Probert was *not given any order* in regard to this 34th car in the train which was without working brakes, and would have endangered the whole train, as well as other traffic on the road, had the disabled car been left in the train. Probert discovered the car without brakes *after* the message had been delivered to him, and *after* he had left the engine and was on the ground 1300 feet away from the engine, and was without any means of communicating, either with the train dispatcher or the engineer. It then became his job and his duty, to set out the bad order car from the rest of the train. He had no directions by rule of the railroad, or by order of a superior exactly *where* to put the disabled car, and he immediately, and with efficiency, proceeded to set it out in the proper and logical place, that is on the north end of the housetrack where there was plenty of room for it, and where it would not have been in the way of any other traffic. It was only because of the negligence of the servants of respondent, who were in charge of the engine, in failing to obey Probert's signals that the fatal accident occurred.

In respondent's brief the following appears: "Several witnesses testified that, in the circumstances of this case 'it would be *improper* to set out the bad order car on the housetrack.' (Rec. 63, 64-74, 82-4, 85-7, 92-3, 99-100, 100-01, 102, 103-4, 107, 110-12, 128, 129, 130)." At the expense of some time we have re-read every word on the above designated pages of the record, but we fail to find the words, *contained in quotation marks* in counsel's brief, but which are not *quoted* from anything in the record.

As we have pointed out in our brief in the instant case, several witnesses, one of them being respondent's principal expert witness, testified that under the circumstances shown by the evidence the housetrack was the proper place on which to set out the bad order car, and no witness testified that it was not proper to put the bad order car on the housetrack (Petitioner's brief 11-13). Several of respondent's witnesses testified that it would have been proper railroading to have put the train of 34 cars on the passing track, (a thing which is probably not true unless the bad order car was first removed from the end of the 34 cars) but no witness for either side testified that it was *improper* to have set out the bad order car on the housetrack.

Gustav H. Shavel, the train dispatcher, who caused the message in question to be sent, in answer to questions put to him by the trial judge, said: "There was not any designation contained in my message as to a bad order car and where to set it out; *my message dealt with the string of thirty-four cars*" (Rec. 112-113).

Counsel say (Respondent's brief 2) that the engineer "ordered" Probert to do certain things, and cite Rec. 137, as a basis for this statement. Neither at record 137,

nor at any other place, does it appear that the engineer gave, or had the right or authority to give, any orders to Probert, the head brakeman. In the absence of the conductor and rear brakeman, as was the case here, the head brakeman was in charge of the train (Rec. 32, 33, 73).

Every employe of respondent who testified on the subject used the name "passing track", as designating the passing track in the instant case. They called it nothing else (Rec. 79, 91, 98, 110, 116, 123, 127, 138, 150). The claim that it was not used as a passing track is a mere subterfuge.

Counsel seeks to give the impression that the house track, and particularly the north end of the track had been very little used. We discussed this question in our Petition (pp. 14-15), but in addition to what we said there, we would like to point out the following evidence showing that the north end of the housetrack had been used and that it was a proper place for Probert to set out the bad order car.

Muto, section foreman for respondent, testified: "Before this accident, during the time I was there, *say ten years before, cars rolled up against those bumper ties, that is all, but not off*" (Rec. 120. Emphasis ours).

In its opinion, (Rec. 147), the Appellate Court states: "And it was he (Probert) who was responsible for the movement at Waukegan, leaving part of the train behind."

Following this entirely unfounded part of the opinion of the Appellate Court, counsel for the respondent, in their brief in this Court (Resp. Brief 4) states the following:

"Its obvious purpose is to mislead to the belief that Probert had the right to 'set out' the 'bad order' car, just as the conductor was doing at Waukegan, when he was interrupted by Probert's false report to the engineer and fireman that he had received a signal to pull out of town, which was the cause of the leaving of part of the train, and the conductor and rear brakeman, at that place."

This "false report" is wholly a creature of counsel's imagination. While there is evidence that Probert told the engineer and fireman at Lake Bluff that he, Probert, had got a highball from the rear end (Rec. 136), and although there were several witnesses of respondent who testified who ought to have known the facts of the case, there is not one who said anything indicating that all that Probert said about the signal coming from the rear end was not true.

Grogan, the conductor, who must have known whether he or his brakeman had given a signal which Probert received to start the train south did not attempt to explain the matter. Grogan simply testified "for some reason the front end of our train, that is the engine and the 34 cars, including this bad order car as the last car of the 34, left Waukegan and went on South on the eastward main line" (Rec. 127).

Foley, the rear brakeman who was left at Waukegan, says that he did not take any part in the operations at Waukegan and he did not testify concerning any signals that were given or not given (Rec. 132).

Kolls, another freight brakeman, employed by the respondent, testified about the proceedings at Waukegan but said nothing about the giving or failure to give any signals (Rec. 133-135).

No one of Probert's fellow workers came into court and testified that the dead man, who could no longer speak for himself, had given a "false report to engineer and fireman that he had received a signal to pull out of town." That remained to be done by counsel for respondent in this Court.

Counsel for the petitioner have attempted to state the facts, and inferences from the facts, correctly, although concededly in their most favorable light to the plaintiff, as we are entitled to do, in view of the verdict and judgment in favor of petitioner. Counsel for the respondent, in seven numbered paragraphs and fifteen lettered paragraphs, have set out alleged inaccuracies in their brief (Respondent's brief 1-14).

We have above pointed out what we believe to be the most glaring inaccuracies of counsel's corrections. Without inpugning the integrity of either counsel, all of this dispute as to the inferences to be drawn from the evidence merely tends to demonstrate, to this Court, that the matters involved were questions of fact for the jury and that the inferences drawn by the jury and its conclusion should be allowed to stand.

Counsel for respondent in their brief (p. 19) print the names of an imposing list of cases decided by this Court. A large number of these cases, so far as the claim is concerned that they are against the petitioner in the instant case, are disposed of by the opinion of Mr. Justice Roberts in *Rocco* v. *Lehigh Valley R. Co.*, 288 U. S. 275, 278, quoted by us in our first brief at page 24.

As to the other cases cited by counsel for respondent may we add a few words?

Great Northern Ry. Co. v. *Wiles,* U. S. 444, in which plaintiff's intestate failed to perform his positive duty of going back to flag an oncoming train. There was no other negligence by any person connected with the railroad company.

Atlantic Coast Line v. *Davis,* 279 U. S. 34, in which a man chose to stand on a certain very small place where it was known to him to be very dangerous instead of standing in any one of several other places which were just as convenient where there would be no danger. There was no negligence shown on the part of the railroad company.

Southern Ry. Co. v. *Gray,* 241 U. S. 333, where a brakeman sent forward to flag an oncoming train, lay down with his head on a tie close to the rail and was killed by the train that he was sent to flag.

Frese v. *C. B. & Q. R. R.,* 263 U. S. 1, where an engineer violated a state statute requiring him to come to a complete stop and ascertain positively whether the crossing was clear, but proceeded across and had a collision and was killed.

Respectfully submitted,

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